Supreme Court, U. S.
FILED
SEP 13 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. .....

76-3741

LEATHA BENITA SIMS, by her next friend and Mother, Linda Gail Sims,

Petitioner,

—v.—

WILLIAM WALN and MAX LAUNDER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL E. GELTNER
STANLEY K. LAUGHLIN
CLYDE L. ELLIS
American Civil Liberties
Union of Ohio
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Opinions Below.....	1
Questions Presented.....	2
Constitutional Provisions and Statutes Involved.....	3
Statement of the Case.....	4
Facts.....	5
Reasons for Granting the Writ.....	8
1. Cruel and Unusual Punishment.	9
2. Deprivation of Liberty Without Due Process of Law.....	12
3. Parental Rights.....	13
Conclusion.....	15
Appendix	
Opinion of United States Court of Appeals for the Sixth Circuit	A1
Opinion of the United States District Court for The Southern District of Ohio, Western Division.....	A7

Table of Authorities

Cases	Page
Baker v. Owen, 395 F. Supp 294 (M.D.N.C. 1975), (3 judge court), aff'd 423 U.S. 907 (1975)	11, 12, 14
Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974)	11
Dixon v. Youngstown Bd. of Ed., C-73-11884 (N.D.O. 7/23/75) (unreported)	14, 15
Furman v. Georgia, 408 U.S. 338 (1972)	9
Gonyaw v. Gray, 361 F.Supp 366 (D. Vt. 1973)	10, 11, 13, 14
Goss v. Lopez, 419 U.S. 565 (1975)	12, 13
Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972).	11, 12, 14
Gregg v. Georgia, ___ U.S. ___ (1976)	10
Ingraham v. Wright, 44 U.S.L.W. 3670	10, 12, 13, 14
Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968)	11

Mahanes v. Hall (E.D.Va. 1974) (unreported opinion)	8, 12, 14
Meyer v. Nebraska, 262 U.S. 390 (1923)	13
Nelson v. Heyne, 491, F.2d 352 (7th Cir. 1974)	11
Pierce v. Society of Sisters, 268 (U.S. 510 (1925)	13
Prince v. Massachusetts, 321 U.S. 158 (1974)	13
Sims v. Board of Education, 329 F.Supp. 678 (D.N.M. 1971)	11, 13
Ware v. Estes, 328 F.Supp 657 (N.D. Tex. 1971)	11, 14
Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973)	11
Wisconsin v. Yoder, 406 U.S. 205 (1972)	13

Constitutional Provisions and Statutes

United States Constitution

Amendment VIII	3
Amendment XIV	3

Ohio Revised Code §3319.41.. 3, 4, 5, 8, 9

28 U.S.C. §1343..... 4

28 U.S.C. §1983..... 4, 9

42 U.S.C. §1985(3)..... 4

Other Authority

Reitman, Follman & Ladd,
Corporal Punishment in the
Public School: The Use of
Force in Controlling Student
Behavior (1972)..... 11

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1976

No. _____

LEATHA BENITA SIMS,
by her next friend and
Mother, Linda Gail Sims,

Petitioner,

v.

WILLIAM WALN and
MAX LAUNDER,

Respondents.

PETITITON FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner Leatha Benita Sims, suing by her mother and next friend Linda Gail Sims, respectfully requests that a writ of certiorari be issued to review of judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Southern District of Ohio, Western Division, dismissing her claim after trial to the Court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is officially reported at 536 F.2nd 686. A copy of that opinion is appended at A1. The opinion of the United States District Court for the Southern District of Ohio, Western Division, is officially reported at 388 F.Supp. 543. A copy of that opinion is appended at A7.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on June 15, 1976. No petition for rehearing was filed.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I. Whether a state statute which authorizes public school officials to administer "reasonable corporal punishment" to school children violates the Eighth Amendment to the United States Constitution, because the imposition of corporal punishment to school children by public school officials as a form of punishment is per se cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution.

II. Assuming corporal punishment of school children by public school officials is consistent with the United States Constitution, whether its imposition without fair notice that it will be imposed for the conduct in question, without advance notice to the child and without any opportunity for the child to contest the decision to impose corporal punishment deprives the child of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

III. Whether the imposition of corporal punishment on a school child violates the child's parent's right, protected by the Fourteenth Amendment to the United States Constitution, to control the upbringing of the child when it is imposed without regard to the parent's instructions and when the parent in question has instructed school authorities that she wants to be consulted and to decide whether to permit corporal punishment of the child.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment VIII:

> "Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"

United States Constitution, Amendment XIV:

> "...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

Ohio Revised Code, Section 3319.41 (in pertinent part):

> "A person employed or engaged as a teacher, principal, or administrator in a school, whether public or private, may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such pupil is subject to school authority."

STATEMENT OF THE CASE

This action was commenced under title 42 United States Code, Sections 1983 and 1985(3) The district court had jurisdiction pursuant to title 28, United States Code, Section 1343.

Petitioner Leatha Benita Sims ("Leatha"), a school child, charged defendants, a school principal and vice principal, with having injured her in an effort to inflict corporal punishment on her for a claimed infraction of school rules. Leatha claimed that the defendants' conduct violated her right to be free from serious physical incursions by government officials, protected by the Eighth and Fourteenth Amendments to the United States Constitution and that the statute which authorized their conduct, Section 3319.41 of the Ohio Revised Code, was unconstitutional on its face and as applied under the Eighth and Fourteenth Amendments to the United States Constitution. In addition, the complaint charged that corporal punishment had been imposed in a discriminatory manner, in violation of title 42, United States Code, Section 1985(3). Petitioner sought damages and a declaratory judgment and, only as to the latter claim, injunctive relief.

The case was tried to the court, and Judge Rubin filed his opinion and judgment finding against petitioner on December 16, 1974, concluding that the claim was "insubstantial" and dismissing the claim after the trial for lack of jurisdiction. On appeal the Court of Appeals disagreed with the conclusion of insubstantiality, but affirmed on the merits.

FACTS

Leatha was enrolled in Schaeffer Junior High School, part of the public school system for Springfield, Ohio. On May 14, 1973, when the incident leading to suit occurred, she was thirteen years old. Respondent William Waln ("Waln") was principal of Schaeffer Junior High School, and Respondent Max Launder ("Launder") was assistant principal.

Acting under authority of Section 3319.41 of the Ohio Revised Code, Waln and Launder implemented a policy of inflicting corporal punishment on students for breach of discipline. Although corporal punishment was one of several modes of discipline available, neither respondents nor the Springfield School Board 1/ established objective criteria for when it would be used, and no formal procedural requirements were established as a pre-requisite to its use. Waln testified that he followed a policy of "common sense," 2/ administering corporal punishment without

---

1/ The Springfield School System policy manual authorized corporal punishment, which it defined as "any use of physical force by a principal or teacher on a pupil," but contained no criteria for its use. Petitioner defined corporal punishment at trial as "the infliction of pain as a penalty for engaging in disapproved conduct or to coerce compliance with rules." Plaintiff's Pre-Trial Memorandum, p.2; Pltf's Exh. No. 2.

2/ Deposition of August 6, 1974, p. 22, introduced as exhibit at trial.

regard to parental disapproval. Corporal punishment - or "cracks" - was to consist of two or three blows to the buttocks with a flat wooden paddle thrity inches long, three eighths of an inch thick and one and three quarters inches wide, administered by either Waln or Launder in the presence of the other.

Leatha was assigned to serve a detention on May 14, 1973 for a prior infraction of school rules. 3/ She went to Waln's office and requested to be excused from detention on that date, because she had to babysit for her younger sister. Waln demanded proof and, since Leatha had no note, instructed her to call her mother for verification. There was no answer when Leatha dialed the telephone number where she thought she could reach her mother. At that point, Waln told her to go into his office to get two "cracks." Although the trial judge credited Waln's testimony that he offered Leatha a choice between detention and cracks, Leatha testified that she was not told she had a choice to avoid detention. Waln told Leatha to put down her books and remove her coat, calling in Launder to observe. Leatha continued to refuse to take her coat off or bend down to expose her buttocks and became very upset. Waln became agitated and tried

3/ Leatha testified the detention was for being tardy on an earlier date, while Waln testified it was either for cutting classes or chewing gum.

to force Leatha to remove her coat and bend against his desk. Launder, who was standing and blocking the door, described the scene as a scuffle and testified that Leatha fell down in her effort to escape from Waln. Leatha testified that the fall occurred when Waln pushed her onto his desk in an effort to get her into paddling position and she fell off. The trial judge found that "contact was made between plaintiff and defendant Waln resulting in plaintiff slipping to the floor and sustaining an injury to her knee."

At that point, Launder intervened and persuaded Waln to let Leatha go and take "other routes." She was then permitted to leave the office and was suspended by letter from Waln to her mother.

Leatha's mother, Mrs. Linda Sims, testified that Leatha came home "very excited, upset, crying, and just in a terrible state, really." She testified that she had, on one earlier occasion, authorized Waln to give Leatha "cracks" but that she, herself, was present on the occasion. Otherwise, she testified, she told Waln that "I would like to be notified first, you know, and if it comes to that, I told him I didn't want my children paddled." (tr.14).

At trial, in addition to offering testimony concerning the event, petitioner offered extensive expert evidence on the effects and efficacy of corporal punish-

ment. 4/ This evidence came through the testimony of Dr. Arthur Thomas, and Dr. Virgil Blancke, experts in the field of educational administration, several supportive exhibits and testimony of psychologists offered in an earlier case, Mahanes vs. Hall (E.D.Va. 1974) (unreported opinion), which the trial judge accepted as a plaintiff's exhibit. The substance of this testimony, which was detailed and thoroughly documented, was that corporal punishment, administered as a means of maintaining public school discipline was (1) of no value as a long-term means of modifying undesirable behavior or habits, (2) ineffective as a method of managing immediate school discipline problems in comparison to less harmful means and (3) significantly harmful to school children because of the negative attitude it creates toward the school and because of the physical pain and, occasionally, injury, it causes.

REASONS FOR GRANTING THE WRIT

The Court of Appeals concluded that "the plaintiff was not subjected to corporal punishment during the incident in question." A5-A6. There was, of course no disagreement with the district judge's finding that "No 'cracks' were administered by Defendant Waln." A9. It was also undisputed that Waln tried forcibly to impose "cracks" as authorized by §3319.41., and that Leatha was injured when she fell, while grappling with Waln in her efforts to avoid Waln's paddle.

4/ Respondent offered no evidence.

Waln's use of force 5/ was privileged if, but only if, §3319.41 was valid. If it is unconstitutional, then his miscarried effort to use force on Leatha was unprivileged and entitled her to damages under 42 U.S.C. §1983. Thus, despite the Court of Appeals' statement, the constitutional legitimacy of "reasonable corporal punishment" is very much in issue in this case.

1. CRUEL AND UNUSUAL PUNISHMENT.

The theory of petitioner's case was that corporal punishment was cruel and unusual in the constitutional sense if it was proved, as a matter of fact, to be (1) useless as a means of modification of harmful behavior, (2) significantly harmful and (3) capable of being replaced by equally effective and less drastic means. The foregoing theory of cruel and unusual punishment was derived primarily from this court's opinions in Furman vs. Georgia, 408 U.S. 338 (1972). Particularly pertinent was Mr. Justice White's explanation for his vote in Furman:

> "...But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought to be justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however,

5/ Throughout this case, petitioner made clear her position that the attack on §3319.41 did not involve any claim that the use of force was impermissible as a method of self-defense or defense of others.

> the emerging question is whether its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be potently excessive and cruel and unusual punishment violative of the Eighth Amendment." 408 U.S. at 312.

We do not believe the Court's recent opinions in Gregg vs. Georgia, _____ U.S. _____, (1976) et al. change the foregoing test.

If, as petitioner believes, the issues of whether corporal punishment is cruel and unusual in the constitutional sense is one of fact, it was proved, without expert opinion to the contrary, in this case.

As the Court knows, the writ of certiorari was granted in Ingraham vs. Wright, 44 U.S.L.W. 3670 to review the en banc decision of the United States Court of Appeals for the Fifth Circuit, 525 F.2nd 909 (1976) which raises the issue of whether "severe" corporal punishment violates the Eighth Amendment. This case, of course, raises the broader issue of whether corporal punishment ordinarily characterized as "reasonable" is likewise cruel and unusual.

There is of course, substantial authority opposed to petitioner's position. See, e.g., Gonyaw vs. Gray, 361 F.Supp. 366

(D.Vt. 1973); Glaser vs. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972); Sims vs. Bd. of Ed., 329 F.Supp. 678 (D.N.M. 1971); Ware vs. Estes, 328 F.Supp. 657 (N.D. Tex. 1971). See also Baker vs. Owen, 395 F. Supp. 294 (M.D.N.C. 1975) (3 judge court), aff'd 423 U.S. 907 (1975).

The primary authority in support of petitioner's position stems from the conclusion that corporal punishment is cruel and unusual in highly analogous circumstances. See, e.g., Nelson vs. Heyne, 491 F.2nd 352 (7th Cir. 1974) (reform school boys); Wheeler vs. Glass, 473 F.2nd 983 (7th Cir. 1973) (Mental Institution); Jackson vs. Bishop, 404 F.2nd 571 (8th Cir. 1968) (Adult, male prisoners). cf. Bramlet vs. Wilson, 495 F.2nd 714 (8th Cir. 1974). To permit government authorities to do to school children what they are forbidden to do to prisoners is plainly illogical. Moreover, while use of corporal punishment is widespread in schools, see Reitman, Follman and Ladd, Corporal Punishment in the Public School: The Use of Force in Controlling Student Behavior (1972), it is unusual in the sense that its use by the State in all other contexts has been banned in our society.

The Court's affirmance of the decision in Baker vs. Owen, supra, is not dispositive of this issue, because that case presented no evidence directed at the cruel and unusual punishment issue.

2. DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW

Corporal punishment, if permissible, must be preceded by at least that level of due process of law which the Court imposed on ten day suspensions of school children. Goss vs. Lopez, 419 U.S. 565 (1975). Here, on the contrary, there was neither advance notice of what conduct would bring corporal punishment nor actual notice of a charge nor an opportunity to defend. Given the record in this case, the evidence of psychological harm together with the actual physical pain involved should satisfy even the concept of "grievous loss" urged as a prerequisite to the due process requirement by the dissenters in Goss vs. Lopez, 419 U.S. at 588 (Powell, J., dissenting). The issue is before the Court as to "severe: corporal punishment in Ingraham vs. Wright, supra, and, we believe, the record in this case presents the issue as to "reasonable" corporal punishment despite the Court of Appeals' refusal to reach it. It was, of course, raised and argued below.

The lower courts appear to be split on this issue. In support of petitioner's position are Baker vs. Owen, 395 F.Supp. 294 (M.D.N.C. 1975) (the defendants' failure to appeal the three-judge court's ruling against them forecloses the argument that this Court's affirmance reaches the due process issue); Glaser vs. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972) (requiring due process of law but finding it met); Mahanes vs. Hall, (E.D. Va. 1974) (unreported

opinion). To the contrary are Ingraham vs. Wright, supra; Gonyaw vs. Gray, 361 F.Supp. 366 (D.Ct. 1973) and Sims vs. Bd. of Ed., 329 F.Supp. 678 (D.N.M. 1971).

PARENTAL RIGHTS

The Court has consistently held that parents have a fundamental right to bring up their offsprings according to their own precepts and convictions. Prince vs. Massachusetts, 321 U.S. 158 (1974); Pierce vs. Society of Sisters, 268 U.S. 510 (1925); Meyer vs. Nebraska, 262 U.S. 390 (1923). The more recent decision in Wisconsin vs. Yoder, 406 U.S. 205 (1972) (upholding the right to Amish parents to keep their children out of school) continued the Court's policy that, in important matters of conscience, the State's interest must give way to that of the parents.

This case does not present the claim that the child of a parent opposed to corporal punishment can disrupt the school with impunity. The rights of other school children were not involved in this case; in any case in which they are, they can readily be protected by penalties up to and including suspension or expulsion under Goss vs. Lopez, supra.

Although the Court of Appeals in this case relied on part on the fact that Linda Sims had, once before, permitted Waln to paddle Leatha, the record establishes her unambiguous assertion of the right to decide whether Leatha should be paddled. She was present at the paddling three months

earlier, concluding it was appropriate and authorizing it. Mrs. Sims' testimony at trial was that she told Waln that she wanted to be notified or else did not want her children paddled. Moreover, Waln's testimony established that the school did not believe itself bound by parental statement of desires. See Deposition of August 6, 1974, p. 28, introduced at trial. ("I might honor that request [not to use corporal punishment] and I might not").

Unlike the first two issues presented in this case, the claim that "liberty," within the meaning of the due process clause of the Fourteenth Amendment, guarantees the parent the ultimate right to control the form of discipline imposed on the child is not among the questions presented to the Court in Ingraham vs. Wright, supra. We do not believe the Court's affirmance of Baker vs. Owen, 395 F.Supp. 294 (M.D.N.C. 1975) to be controlling on this issue, since there the lower court found corporal punishment was used "to restrain or correct pupils and maintain order."

In substance, petitioner's position has been adopted by Glaser vs. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972) and Mahanes vs. Hall (E.D. Va. 1972) (unreported opinion) and rejected by Gonyaw vs. Gray, 361 F.Supp. 366 (D.Vt. 1973); Ware vs. Estes, 328 F.Supp. 657 (N.D. Tex. 1971), aff'd without opinion, 458 F.2nd 1360 (5th Cir. 1974); Baker vs. Owen, supra and, in addition to the court below, by a three-judge court of the Sixth Circuit in an unreported opinion. Dixon vs. Youngstown

Bd. of Ed. C-73-11884 (N.D.O. 7/23/75) (unreported).

CONCLUSION

This case presents an appropriate record on which to resolve the significant constitutional issues raised by the use of corporal punishment in the public schools and, for that reason, the writ of certiorari should be granted.

Respectfully submitted,

Michael E. Geltner
Stanley K. Laughlin
Clyde L. Ellis
American Civil Liberties
Union of Ohio
203 East Broad Street
Columbus, Ohio 43215

Melvin L. Wulf
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Petitioner

AFFIDAVIT OF SERVICE

The undersigned, being duly sworn, swears that three copies of the attached petition for a writ of certiorari were served on counsel for respondents by mailing, postpaid, on September , 1976 addressed to:

William H. Thornburg, Esq.
1012 3rd National Bank Building
Dayton, Ohio 45402

Alfred J. Weisbrod, Esq.
107 W. Main Street
Troy, Ohio 45373

William Brown, Esq.
Attorney General of Ohio
State Office Tower
30 E. Broad Street
Columbus, Ohio 43215

_____

Sworn to before me
this 13th day of
September, 1976

_____
Notary Public

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1383

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LEATHA BENITA SIMS, by her next friend and mother, LINDA GAIL SIMS,

Plaintiff-Appellant,

v.

WILLIAM WALN and MAX LAUNDER,

Defendants-Appellees.

APPEAL from the United States District Court for the Southern District of Ohio, Western Division.

Decided and Filed June 15, 1976.

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

PER CURIAM. Plaintiff Leatha Benita Sims is a 16-year-old Negro, who in May 1973 was a student at Schaeffer Junior High School in Springfield, Ohio. Defendants William Waln and Max Launder were, respectively, principal and assistant principal of the school at that time.

This action arose out of an incident which occurred on May 14, 1973. On that date Miss Sims was ordered by her teacher to stay after school as punishment for a violation of school rules.[1] This form of discipline is known in the school as detention. Immediately after school Miss Sims went to the principal's office and requested that she not be required to remain after school on that day, stating that she had to babysit. She was unable, however, to reach her mother by telephone to verify her story.

[1] Waln testified that Miss Sims was detained either for cutting classes or for chewing gum.

BEST COPY AVAILABLE

Officials at Schaeffer Junior High also employ a type of punishment known as "corporal punishment", whereby a student is punished by imposition of blows on the buttock with a paddle, known as "cracks". The maximum number of cracks given a student under school policy is three. Ohio Rev. Code § 3319.41[2] authorizes the principal of the school to impose such punishment.

Defendant Waln offered Miss Sims two cracks as an alternative punishment to detention. Miss Sims refused to accept the cracks and refused to remain after school. She fled from Waln's office and contact was made between her and Waln as he attempted to grab her. Miss Sims slipped to the floor and sustained a slight injury to her knee. No cracks were actually administered by defendants upon plaintiff on that day.

Plaintiff filed this action in the district court under 42 U.S.C. §§ 1983 and 1985, premising federal jurisdiction on 28 U.S.C. § 1343. She sought a declaratory judgment that O.R.C. § 3319.41 is unconstitutional on its face and as applied to her. She sought punitive and compensatory damages from defendants for injuries she allegedly suffered on May 14, 1973, and an injunction enjoining defendants from discriminating against Negro students in the infliction of corporal punishment.

Liberally construed, the complaint could be read as alleging basically four claims. The first three claims related to the constitutionality of O.R.C. § 3319.41. First, plaintiff claimed that the statute is unconstitutional because it authorizes corporal punishment, a *per se* violation of the Eighth Amendment prohibition against Cruel and Unusual Punishment. Second, she argued the statute unconstitutionally abridges a parent's First and Fourteenth Amendment right to bring up his child in the manner he sees fit by authorizing school officials to impose

[2] Ohio Revised Code § 3319.41, in effect on May 14, 1973, when the incident in question took place, provided in relevant part:

> "A person employed or engaged as a teacher, principal, or administrator in a school, whether public or private, may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such pupil is subject to school authority.

corporal punishment even though the parent might not consent. Third, she claimed the statute is unconstitutional on its face and as applied to her because it fails to provide for any Due Process Clause procedural guarantees before corporal punishment is imposed. The final claim was that corporal punishment was imposed at Schaeffer Junior High discriminatorily against her and other Negro students at the school in violation of the Equal Protection Clause.

The district judge held a full trial, hearing witnesses and taking testimony. He thereafter issued a memorandum opinion, 388 F. Supp. 543 (S.D. Ohio, 1974), in which he concluded that plaintiff's cause of action stated no substantial federal question under § 1983. Judgment was entered dismissing the action on the merits. While we disagree with the district court's conclusion that the plaintiff's federal claims are insubstantial, we nevertheless affirm its judgment dismissing the complaint on the merits and granting judgment for defendants.

The issue of "constitutional insubstantiality" was recently reviewed by the Supreme Court in the context of a § 1983 action brought under § 1343(3), *Hagans* v. *Lavine*, 415 U.S. 528 (1974). There the court noted that in its previous interpretations of that doctrine it had found claims to be insubstantial only where they were "obviously without merit", "wholly insubstantial", or where "previous decisions inescapably render the claims frivolous." *Hagans* v. *Lavine*, 415 U.S. at 537, 538 (quoting prior cases). We are not aware of any Supreme Court decision specifically dealing with the type of claim presented here.[3] Further, *Dixon* v. *Youngstown City*

[3] In *Baker* v. *Owen*, 395 F. Supp. 294 (M.D. N.C. 1975) (three judge court) *aff'd mem.*, 423 U.S. 907 (1975), the Supreme Court summarily affirmed a district court judgment that a North Carolina statute authorizing corporal punishment was not unconstitutional on its face. Plaintiff there had raised many of the same issues presented in the instant case. The *Baker* case was, of course, decided subsequent to the district court decision in this case. *Goss* v. *Lopez*, 419 U.S. 565 (1975) dealt with another aspect of school discipline, suspension from school. However, many of the claims presented here were in no way at issue there.

Board of Education, C-73-1188Y, (N.D. Ohio, July 23, 1975), an unreported decision in which a three judge district court upheld the constitutionality of the same statute, had not yet been handed down. These circumstances lead us to conclude that the federal claims presented in plaintiff's complaint, in the constitutional sense, were not so frivolous or insubstantial as to oust the district court of its jurisdiction to hear the case.

Plaintiff's first claim is that corporal punishment imposed by school officials is a *per se* violation of the Eighth Amendment prohibition against Cruel and Unusual Punishment, made applicable to the states through the Fourteenth Amendment. Other federal courts which have considered this claim have uniformly rejected such a contention. *Ingraham* v. *Wright*, 525 F. 2d 909 (5th Cir. 1976) (*en banc*) *cert. granted*, 44 U.S.L.W. 3670 (May 25, 1976), *Dixon* v. *Youngstown City Board of Education*, *supra*, *Ware* v. *Estes*, 328 F. Supp. 77 (N.D. Tex.) *aff'd.* 458 F. 2d 1360 (5th Cir. 1972). *Glaser* v. *Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972), *Sims* v. *Board of Education*, 329 F. Supp. 678 (D.N.M. 1971). Plaintiff cannot contend that the policy followed at Schaeffer of imposing no more than three cracks is "excessive" in the constitutional sense, *cf. O'Neil* v. *Vermont*, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting), as there is no evidence in the record to support such a contention. Plaintiff's attack of the statute on Eighth Amendment grounds must therefore fail.

Plaintiff attacks O.R.C. § 3319.41 on two Fourteenth Amendment grounds. First, she claims the statute interferes with a parent's constitutional right to decide whether his child is to be subject to corporal punishment. The Supreme Court has long recognized the constitutional stature of parental rights to bring up their children. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). These parental rights are not absolute, however, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1943), and the use of corporal punishment is not forbidden simply because it interferes in some instances with the right of parental control. *Baker* v. *Owen*,

395 F. Supp. 294 (M.D. N.C. 1975) (three judge court) *aff'd. mem.* 423 U.S. 907 (1975). *Dixon* v. *Youngstown Board of Education*, *supra*, *Conyaw* v. *Gray*, 361 F. Supp. 366 (D. Vt. 1973), *Ware* v. *Estes*, *supra*. Here, moreover, it appears from the record that on a previous occasion plaintiff's mother had consented to the imposition of corporal punishment upon plaintiff. We, therefore, find plaintiff's contention in this regard to be without merit.

Plaintiff's second Fourteenth Amendment claim is that the Ohio statute is unconstitutional because it provides no procedural safeguards which teachers and administrators must follow before imposing corporal punishment. We note that while some courts have held that a student has a liberty interest in freedom from corporal punishment protected by the Fourteenth Amendment procedural guarantees, *Baker* v. *Owen*, *supra*, other courts have refused to find such a constitutionally protected interest. *Ingraham* v. *Wright*, *supra*, *Conyaw* v. *Gray*, *supra*. *Cf. Goss* v. *Lopez*, 419 U.S. 565 (1975).[4]

We need not decide whether plaintiff had a constitutional right to be free from corporal punishment entitled to the procedural guarantees of the Due Process Clause. The failure of the Ohio legislature to explicitly provide such procedural safeguards does not render the statute unconstitutional on its face. *Baker* v. *Owen*, *supra*. The record in this case clearly reflects that the plaintiff was not subjected to corporal punish-

[4] In *Goss* v. *Lopez*, *supra*, the United States Supreme Court held that high school students who under Ohio law could be suspended from school for up to ten days for misconduct, had liberty and property interests in remaining in school entitled to the protection of the Due Process Clause. Thus the court held that students could not be suspended without a hearing which comported with minimal due process guarantees. Four members of the court dissented, arguing that the infringement of the students' right to education was too slight and insubstantial to justify imposition of a constitutional rule. In view of the sharp division of opinion of the various justices on this matter, we express no opinion as to whether *Goss* should be extended to require that due process standards be met before corporal punishment is imposed. We note only that corporal punishment as imposed in Schaeffer Junior High is a less severe form of discipline than suspension from school.

ment during the incident in question. If she had a right entitled to the protection of Due Process Clause guarantees, such a right was not infringed here.

Appellant's final contention is that defendants engaged in an intentional practice of discriminatory use of corporal punishment against Negro students in Schaeffer Junior High solely on the basis of their race. The only evidence introduced by plaintiff to support her claim was statistical evidence for one year showing that a greater percentage of Negro and other minority students were subjected to corporal punishment during that year than were white students. In terms of absolute numbers, far more white students actually received corporal punishment, because whites constituted about 90% of the school population.

There was no showing that the discipline imposed here was more severe than that imposed upon white students for the same misconduct, or that the principal's actions were in any way motivated by bias. Under such circumstances the district court's finding that the punishment was not discriminatorily imposed is not clearly erroneous.

The judgment of the district court is affirmed.

OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

LEATHA BENITA SIMS,
by her next friend and
Mother, Linda Gail Sims,

Petitioner,

vs.

WILLIAM WALN and
MAX LAUNDER,

Respondents,

Civ. No. 4526

December 16, 1974

FINDINGS OF FACT, OPINION AND
CONCLUSIONS OF LAW

RUBIN, District Judge.

This matter is before the Court following trial, presentation of evidence and testimony and a post trial memorandum. Plaintiff seeks damages, both compensatory and punitive, an injunction against defendants from discriminating against plaintiff or other black persons in the infliction of corporal punishment, and a declaratory judgment holding §3319.41 Ohio Rev. Code to be unconstitutional.

In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does herewith submit its Findings of Fact and Conclusions of Law.

I.

FINDINGS OF FACT

1.

Plaintiff, Leatha Benita Sims, is a minor age 15. In May of 1973 she was a student at Schaeffer Junior High School, Springfield, Ohio.

2.

Among the disciplinary punishments used at Schaeffer Junior High School are "detention" and "corporal punishment." When punished by detention a student remains after school for a period of forty-five minutes. Corporal punishment is administered by a teacher or by the principal by use of a paddle, supplied by the Springfield Board of Education, on the buttocks of the student being disciplined. The maximum number of blows with the paddle, referred to at Schaeffer Junior High School as "cracks," never exceeds three. Corporal punishment may be administered by the principal of a school in accordance with §3319.41, Ohio Rev. Code. 1/

On May 14, 1973, plaintiff Sims had been punished by imposition of a detention. She appeared at the office of the principal seeking to be relieved from detention and

asserting that she was required to babysit. No note or previous information had been supplied to the school authorities and plaintiff Sims was required to make a telephone call to verify her obligation. She was unable to reach her mother for verification and was thereupon offered a choice by defendant Waln of detention or "two cracks." Plaintiff Sims declined to do either and fled from the principal's office. Contact was made between plaintiff and defendant Waln resulting in plaintiff slipping to the floor and sustaining an injury to her knee. No "cracks" were administered by defendant Waln.

4.

Defendant Max Launder, Assistant Principal, had been requested by defendant Waln to serve as a witness. Other than observe the incident, defendant Launder did not participate. No evidence has been presented that he touched the person of the plaintiff or that he gave her any instructions.

5.

A record of disciplinary action involving students at Schaeffer Junior High School is maintained in the office of the principal. During the school year 1972-73, plaintiff Sims was disciplined on forty occasions. On April 12, 1973, two "cracks" were inflicted after consultation with plaintiff's mother. During the School year 1973-74, plaintiff was disciplined thirty-six times without the administration of any "cracks". No conclusive probative evidence has been presented indicating that corporal punishment is administered in a discriminatory fashion, either by reason of sex or by reason of race.

II.

OPINION

[1] This Court is met by a threshold question raised by the United States Court of Appeals for the Sixth Circuit in the case of R. Brooks Bates v. Leslie Dause and Robert Garner, 502 F.2d 865 (1974). In the Dause case the Court considered a §1983 claim as it related to demotion and transfer of principals of two elementary schools. Plaintiffs had asserted a deprivation of rights to support an action under §1983 and pendant jurisdiction under the Kentucky Teachers Tenure Act. Dause teaches before a Federal Court can grant relief to a plaintiff, it must first determine that the federal claims have substance sufficient to confer subject matter jurisdiction on the court. United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966); Price v. United Mine Workers of America 336 F.2d 771 (6th Cir. 1964); Patrum v. Greensburg, 419 F.2d 1300 (6th Cir. 1969), cert. den., 397 U.S. 990, 90 S.Ct. 1125, 25 L.Ed.2d 398 (1970).

The question of whether a claim has sufficient substance, or, in other words, whether it presents a "substantial question" that will confer subject matter jurisdiction on a federal court was recently discussed at length by the Supreme Court in Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 1378, 39 L.Ed.2d 577 (1973). The Court said, per the majority opinion of Mr. Justice White 2/ that:

> The principle applied by the Court of Appeals -- that a "substantial" question was necessary to support jurisdiction -- was unexceptionable under prior cases. Over the years

this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit," Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 [24 S.Ct. 553, 557, 48 L.Ed. 795] (1904); "wholly insubstantial," Bailey v. Patterson, 369 U.S. 31, 33 [82 S.Ct. 549, 550-551, 7 L.Ed. 2d 512] (1962); "obviously frivolous," Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 [30 S.Ct. 326, 327, 54 L.Ed. 482] (1910); "plainly unsubstantial", Levering & Garriques Co. v. Morrin, 289 U.S. 103, 105 [53 S.Ct. 549, 550, 77 L.Ed. 1062] (1933); or "no longer open to discussion," McGilvra v. Ross, 215 U.S. 70, 80 [30 S.Ct. 27, 31, 54 L. Ed. 95] (1909). One of the principal decisions on the subject, Ex Parte Poresky, 290 U.S. 30, 31-32 [54 S.Ct. 3, 4-5, 78 L.Ed. 152] (1933), held, first that "[i]n the absence of diversity of citizenship, it is essential to jurisdiction that a substantial federal question should be presented"; second, that a three-judge court was not necessary to pass upon this initial question of jurisdiction; and third, that "[t]he question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question

sought to be raised can be the subject of controversy'. Levering & Garriques Co. v. Morrin, supra; Ilannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 [30 S.Ct. 326, 54 L.Ed. 482]; McGilvra v. Ross, 215 U.S. 70, 80 [30 S.Ct. 27, 54 L.Ed. 95]."

Only recently this Court again reviewed this general question where it arose in the context of convening a three-judge court under 28 U.S.C. §2281;

"'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' Bailey v. Patterson, 369 U.S., at 33 [82 S.Ct. 549, at 551], 'wholly insubstantial', ibid.; 'obviously frivolous,' Hannis Distilling Co. v. Baltimore, 216 U.S. 285, 288 [30 S.Ct. 326, 327, 54 L.Ed. 482] (1910); and 'obviously without merit,' Ex Parte Poresky, 290 U.S. 30, 32 [54 S.Ct. 3, 4-5, 78 L.Ed. 152] (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. §2281. A claim is insubstantial only if '"its unsoundness so clearly

results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."' Ex Parte Poresky, supra, at 32 [54 S.Ct. 3, at 4], quoting from Hannis Distilling Co. v. Baltimore, supra [216 U.S.], at 288 [30 S.Ct. 326, at 327]; see also Levering & Garriques Co. v. Morrin, 289 U.S. 103, 105-106, [53 S.Ct. 549, 550, 77 L.Ed. 1062] (1933); McGilvra v. Ross, 215 U.S. 70, 80 [30 S.Ct. 27, 31, 54 L.Ed. 95] (1909)." Goosby v. Osser, 409 U.S. 512, 518 [93 S.Ct. 854, 858-859, 35 L.Ed.2d 36] (1973).

The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned, Bell v. Hood, 327 U.S. 678, 683 [66 S.Ct. 773, 776, 90 L. Ed. 939] (1946), and characterized as "more ancient than analytically sound," Rosado v. Wyman, supra, [397 U.S. 397], at 404, [90 S.Ct. 1207, at 1214, 25 L.Ed.2d 442]. But it remains the federal rule and needs no reexamination here, ..." Hagans v. Lavine, supra, at 536-538, 94 S.Ct. at 1379

To fully evaluate the substantiality of the federal claims we shall first consider the broad general principles of applicable law; secondly, the relevant law in the State of Ohio; and thirdly, the relevant federal case law.

[2] First, a review of the general legal principles applicable to corporal punishment indicates clearly and conclusively that such is generally permissible.

> A teacher is responsible for the discipline in his school, and for the progress, conduct, and deportment of his pupils. It is his duty to maintain good order and to require of his pupils a faithful performance of their duties. To enable him to discharge such a duty effectually, he must have the power to enforce prompt obedience to his lawful commands. For this reason in proper cases, he may inflict corporal punishment on refractory pupils.

In some jurisdictions the authority of teachers to administer corporal punishment is regulated by statute or by school board regulations. School boards and administrators have the power to promulgate and to enforce reasonable regulations governing students in attendance with the power to impose responsible nondiscriminatory corporal punishment for breaches thereof, without violating any federally protected constitutional rights of pupils. 68 Am. Jur. 2d 585, 586, Schools §258, Corporal Punishment.

It is a well established principle of the law of torts that corporal punishment which is reasonable in degree, and which is administered by a teacher to a pupil as a disciplinary measure is "privileged" in the sense that the

administration of such punishment does not give rise to a cause of action for damages against the teacher. 3/ A.L.R. 2d 469 (II §3(a)) Teachers civil liability for administering corporal punishment to to pupil.

One other than a parent who has been given by law or has voluntarily assumed in whole or in part the function of controlling, training, or educating a child, is privileged to apply such reasonable force or to impose such reasonable confinement as he reasonably believes to be necessary for its proper control, training, or education, except insofar as the parent has restricted the privilege of one to whom he has entrusted the child. Restatement of Torts 2d §147(2), Privilege to Discipline Children; General Principle.

One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training notwithstanding the parent's prohibitions or wishes. Restatement of Torts 2d §153(2), Power of Parent to Restrict Privilege.

As to children, the privilege remains, despite any modern theories, that to spare the rod is not to spoil the child. A parent, or one who stands in the place of a parent, may use reasonable force, including corporal punishment, for discipline and control;

> ...The teachers authority extends to all offenses which directly and immediately affect the decorum and morale of the school... The privilege of either parent or teacher extends to the infliction of any corporal punishment which is reasonable under the circumstances; Prosser; The Law of Torts, 4th Edition, §27, Defenses to Intentional Interferences with Person or Property; Discipline.

It is quite clear that corporal punishment of a pupil by a teacher does not, in and of itself, run counter to the general principles of accepted law. The case law in Ohio is equally clear on the subject:

> [I]t is agreed in Ohio that a schoolteacher may inflict corporal punishment to a reasonable extent if he uses no more force than is necessary. A schoolteacher in effect stands in loco parentis and may administer reasonable chastisement to a pupil to the same extent as the pupil's parent. 7/ 48 O. Jur. 2d part 2, Schools §177 Corporal Punishment.

In State v. Lutz, 65 Ohio L.Abs. 402, 113 N.E.2d 757, the Syllabus By the Court states that:

> 1. A school teacher stands in loco parentis and acts in a quasi judicial capacity and is not liable for an error in judgment in the matter of punishment of a pupil.

> 2. There is a presumption of correctness of the teacher's actions and that he acts in good faith.

The state of the law regarding corporal punishment in Ohio is such that it has caught the eye of the law review writers:

> Between the subjective and objective formulations, a middle ground has been recognized. Ohio for example, has adopted the Prendergrass rule in teacher-pupil cases but not in parent-child situations. The reason offered for the distinction is that in the relatively objective teacher-pupil relationship the teacher acts in a quasi-judicial capacity which requires a maximum of discretion, and, therefore, should be given the benefit of a subjective (good faith) standard. The Legal Framework for Child Protection. 8/

Therefore, before even considering the state statute, it is evident that corporal punishment in Ohio is so unanimously supported by the legal authorities as to leave no room for the plaintiff to question its legal acceptability. That corporal punishment may be challenged on the grounds of unreasonableness, excessive force, permanent injury, improper administrator, improper receiver, improper method, and so on, is not questioned. But the basic question of whether or not it is permissible at all must be answered in the affirmative. And thus when one challenges a state statute authorizing corporal punishment one must look to other areas besides the generally accepted bodies of tort law or the laws and cases of the State of Ohio, for these

indeed put the plaintiff's claim, on the facts presented, in the posture of lacking sufficient substance to confer jurisdiction on the Court.

Turning now to the federal law in this area, one is confronted with essentially two questions: one relating to the Fourteenth Amendment to the United States Consitution (and the statutes enacted under its §5 enforcement provision); and the Eighth Amendment to the United States Constitution (the Cruel and Unusual Punishment clause).

Regarding the Fourteenth Amendment, the standard that consistently appears is the classic "reasonableness" standard. A most concise summary of the Supreme Court cases in this area is provided by Judge William M. Taylor, Jr. in Wares v. Estes, 328 F.Supp. 657 (N.D. Tex. 1971):

> Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922), the state cannot unreasonably interfere with the liberity of parents and guardians to direct the upbringing and education of children under their control. 9/ These parental rights are not beyond limitation.10/ Prince v. Commonswealth of Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645, 652 (1943). In order for a deprivation of due process under the Fourteenth Amendment to occur, the rules and policies of the school district must bear "no unreasonable relation to some purpose within the competency of the State." 11/ Pierce v. Society of Sisters, 268

> U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1076 (1924). (emphasis added) Ware v. Estes, supra, 328 F. Supp, at 658-659. 12/

The federal case law thus does not question the permissibility, or constitutionality, of corporal punishment per se; the federal case law clearly permits corporal punishment, limiting it only by traditional "reasonableness" standards. The federal cases concerning corporal punishment in the Fourteenth Amendment context look to whether or not the punishment is "arbitrary, capricious, unreasonable, or wholly unrelated to the competency of the state in determining its educational policy." Ware v. Estes, supra, 328 F.Supp. at 659. See also: Sims v. Board of Education of Independent School District No. 22, 329 F.Supp. 678 (D.N.M. 1971); Glasser v. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972).

[3,4] Where, as here, the plaintiff cannot even show that there was any corporal punishment inflicted at all, 13/ the Fourteenth Amendment claim is so obviously without legal merit as to cause a failure of this Court's subject matter jurisdiction to that claim.

[5] Regarding the Eighth Amendment claim there is an initial distinction that must be made between criminal penalties and civil penalties. This distinction must be made because the Eighth Amendment is not applicable in a civil context. Concerning the Cruel and Unusual Punishment clause of the Eighth Amendment the Supreme Court has stated that:

> The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes. . . (emphasis added) Powell v. Texas 392 U.S. 514, 531-532, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1967).

See also: Negrich v. Hohn, 246 F.Supp. 173 (W.D.Pa. 1965):

> Not every physical hardship or restraint suffered in the course of governmental activity is to be regarded as punishment. Otherwise much military training in the armed services, and even the space program, whould be proscribed. Punishment is a penalty inflicted by a judicial tribunal in accordance with the law in retribution for criminal conduct. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-167, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); cf. United States v. Brown, 281 U.S. 437, 456-457, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). (emphasis added) Negrich v. Hohn, supra, at 176. Zwick v. Freeman, 373 F.2d 110 (2d Cir. 1967).

The instant action is one in a civil context, challenging the constitutionality of a civil statute administered in a civil setting. In the light of the clear federal law concerning the Eighth Amendment, any attempt to raise said Amendment here is so without merit as to lack sufficient substance to maintain subject matter jurisdiction in this court.

While the plaintiff's Amended Complaint alleges numerous causes of action and numerous claims against the defendants, the federal rights upon which these claims are based reduce down to the Eighth and Fourteenth Amendments, and it is the Court's holding that the plaintiff's claims under said Amendments are "constitutionally insubstantial" and "obviously without merit," prior decisions having inescapably rendered the instant claims frivolous. Hagans v. Lavine, quoted at length supra.

[6,7] Besides the federal constitutional claims, the plaintiff has also alleged other causes of action. Pendant jurisdiction of this Court is available only in situations where there is substance to a federal claim. However, the conclusion reached by the United States Court of Appeals for the Sixth Circuit in the Dause case has pertinence to the matter at hand. The Court held there:

> Transfer of jurisdiction to federal courts cannot be accomplished by the procedural devise of filing an unsubstantial action under §1983, coupled with a prayer for exercise of pendant jurisdiction. Bates v. Dause, supra, 502 F.2d at 867.

An examination of the evidence in this matter leads only to the conclusion that this is an insubstantial claim.

III

CONCLUSIONS OF LAW

A.

[8] The United States District Court has jurisdiction to consider the administration of a state statute only where a substantial federal claim is asserted. Hagans v. Dause, supra.

B.

A student to whom corporal punishment had once been administered in accordance with Ohio Rev.Code §3319.41 with consent of her parent and who is threatened with a second administration of such corporal punishment does not establish, without more, a violation of 42 U.S.C. §1983.

C.

[9] A black student in the posture of a student described in Conclusion of Law B. does not, without more, represent, for purposes of a class action, all other black students of Schaeffer Junior High School.

D.

In the absence of a substantial claim under 42 U.S.C. §1983, this Court lacks jurisdiction and plaintiff's claim must therefore be dismissed.

Let judgment enter in accordance with the foregoing.

Footnotes

1/ In May of 1973 the pertinent portion of Ohio Rev. Code §3319.41 was:

> A person employed or engaged as a teacher, principal, or administrator in a school, whether public or private, may inflict or cause to be inflicted, reasonable corporal punishment upon a pupil attending such school whenever such punishment is reasonably necessary in order to preserve discipline while such pupil is subject to school authority.

2/ Mr. Justice Powell, with whom the Chief Justice and Mr. Justice Rehnquist joined, wrote a dissenting opinion; and Mr. Justice Rehnquist, with whom the Chief Justice and Mr. Justice Powell joined, also wrote a dissenting opinion.

3/ Among extensive citations of cases in support of this principle the following Ohio cases are cited and are on point: Guyton v. Rhodes, 65 Ohio App. 163 (1940), 29 N.E.2d 444 (rule supported by implication); Quinn v. Nolan, 7 Ohio Dec. Reprint 585, 4 W L Bull 81 (1897).

4/ The official comments to §147 indicate its thorough application to the instant action:

> f. The rule stated in this section applies to any person other than a parent who is exercising the parental function of controlling,

training, and educating a child. It applies to persons to whom the law has given complete or partial charge of such matters. Thus, it includes... the teachers and other officials in a public school to which the parent is required to send his child for education.

5/ The official comments to §153 indicate its thorough application to the instant action:

> d. Public schools. This subsection applies not only where the parent is required to send his child to a public school, but also where, having the option to send the child to such a school or to a private school, he elects the former. It is also applicable where the parent, without obligation to do so, sends his child to a high school or State college or university. In such cases, the fact that the parent expresses a desire that the child should not be punished in a particular way or for a particular offense does not restrict the privilege of the school authorities. The will of the parent cannot defeat the policy of the State. The school authorities, therefore, have such disciplinary privilege as is reasonably necessary to secure the education of the child irrespective of the wishes of the parent. The same is true where the parent sends the child to a public school in preference to a private school as a matter of economy or choice.

6/ 48 O.Jur.2d, Schools §177, footnote 17:

Guyton v. Rhodes, 65 Ohio App. 163, 18 Ohio Op. 356, 31 Ohio L.Abs. 591, 29 N.E.2d 444 (supporting rule by implication); Quinn v. Nolan, 7 Ohio Dec. Reprint 585; Martin v. State, 11 Ohio N.P. (n.s.) 183, 21 aff'd by circuit court, aff'd 87 Ohio St. 459, 102 N.E. 1132; State v. Lutz (CP) 65 Ohio L.Abs. 402, 113 N.E.2d 757.

7/ 40 O.Jur.2d, Schools §177, footnote 19:

State v. Lutz, (CP) 65 Ohio L.Abs. 402, 113 N.E.2d 757.

> A teacher has the same right as a parent, in pursuant of the rules of the school known to the parents, to inflict reasonable corporal punishment upon a pupil deserving it. Quinn v. Nolan, 7 Ohio Dec. Reprint 585.

8/ Monrad G. Paulsen: The Legal Framework for Child Protection; 66 Colum.L.Rev. 679, 688 (1966); see also, Norman D. Tripp; Acting "In Loco Parentis" as a Defense to Assault and Battery; 16 Clev-Mar.L.Rev. 39, 43 (1967).

9/ The Court's exact language in Meyer is as follows:

> The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. 262 U.S. at 399, 43 S.Ct. at 626.

10/ The Court's exact language in Prince is as follows:

> But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. (citations omitted) And neither rights of... parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. 321 U.S. at 166, 64 S.Ct. at 442.

11/ The Court's exact language in Pierce is as follows: As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.

12/ In Ware v. Estes the Court found, as against a claim that corporal punishment violated Eighth and Fourteenth Amendment rights, that the plaintiff's claim was insubstantial.

13/ The only time that the plaintiff was ever paddled was well before the incident in question, and was with the knowledge, and consent, of the plaintiff's mother. See Finding of Fact No. 5.

The contact between plaintiff Sims and defendant Waln in the incident in question was, as demonstrated by the evidence, not

what any person familiar with the English language would bring within the definition of corporal punishment.

Supreme Court, U. S.
FILED
NOV 24 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-374

LEATHA BENITA SIMS, by her next friend and Mother, Linda Gail Sims,

Petitioner,

vs.

WILLIAM WALN and MAX LAUNDER,

Respondents.

PETITION OPPOSING WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALFRED J. WEISBROD
ALFRED J. WEISBROD Co., L.P.A.
107 W. Main Street
Troy, Ohio 45373
Attorney for Respondents

COCKLE PRINTING COMPANY, 1823 St. Mary's Avenue, Omaha

INDEX

	Pages
Statement of the Case	1
Statement of Facts	3
Reasons for Denying the Writ	5
1. Cruel and Unusual Punishment	5
2. Deprivation of Liberty Without Due Process of Law	8
3. Parental Rights	10
Conclusion	12

CASES CITED

Bramlet v. Wilson, 495 F. 2d 714 (8 Cir. 1974) 6

Furman v. Georgia, 408 U. S. 238 (1972) 7

Glaser v. Marietta, 351 F. Supp. 555 (W. D. Pa. 1972) 6, 9, 10, 11

Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973) 5, 9, 10, 11

Goss v. Lopez, 419 U. S. 565 (1975) 9

Ingraham v. Wright, 498 F. 2d 248 (5th Cir. 1974) 6, 7, 9

Jackson v. Bishop, 404 F. 2d 571 (8 Cir. 1968) 6

Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) 11

Negrich v. Hohn, 246 F. Supp. 173, 176 (W. D. Pa. 1965) aff'd. 379 F. 2d 213 (3rd Cir.) 5

Nelson v. Heyne, 491 F. 2d 352 (7th Cir. 1974) 6, 7

CASES CITED—Continued

Pages

Pierce v. Society of Sisters, 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1924) 11

Powell v. Texas, 392 U. S. 514, 531-532, 88 S. Ct. 2145, 20 L. Ed. 1254 (1968) 5

Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1943) 11

Sims v. Bd. of Ed., 329 F. Supp. 678 (D. N. M. 1971) .. 6, 9

Ware v. Estes, 328 F. 2d Supp. 657-659 (N. D. Tex. 1971) aff'd. per curiam, 458 F. 2d 1360 (5th Cir. cert. denied 409 U. S. 1027 (1972) 6, 11

Zwick v. Freeman, 373 F. 2d 110, 119 (2d Cir. 1967) 6

STATUTES CITED

Title 42 of the United States Code, Sections 1983 and 1985 (3) 1

Section 3319.41 of the Ohio Revised Code 2, 5, 8, 10

CONSTITUTION CITED

Eighth Amendment, United States Constitution .. 2, 5, 6, 7, 8

Fourteenth Amendment, United States Constitution 2

In The

Supreme Court of the United States

October Term, 1976

No. ____

LEATHA BENITA SIMS, by her next friend and Mother, Linda Gail Sims,

Petitioner,

vs.

WILLIAM WALN and MAX LAUNDER,

Respondents.

PETITION OPPOSING WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

This case is an action brought under Title 42 of the United States Code, Sections 1983 and 1985 (3). The case was originally filed in the United States District Court for the Southern District of Ohio, Western Division.

Leatha Benita Sims, by her next friend and mother, Linda Gail Sims filed suit against the Defendan . William Waln and Max Launder, principal and vice-principal of Schaefer Junior High School, Springfield, Ohio. The basis of this cause of action was to recover damages for alleged injuries inflicted by the Defendants on the Plaintiff when she was allegedly manhandled in Defendant Waln's office. There is no dispute over the fact that no corporal punishment was ever inflicted in this case.

In addition, the action seeked redress for alleged deprivation, under color of state law, of rights, privileges and immunities secured by the Constitution of the United States and by acts of Congress providing for equal rights of citizens. It is alleged that the Defendants acted under authority of Section 3319.41 of the Ohio Revised Code which authorizes corporal punishment. Plaintiff complains that the above section of the Ohio Revised Code is unconstitutional on its face under the Eighth and Fourteenth Amendments to the United States Constitution.

The case was tried before the Honorable Judge Carl Rubin and after a full trial and hearing of the facts the opinion of the Court was filed in favor of the Defendants and against the Petitioner. The case was then appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the decision of the United States District Court for the Southern District of Ohio, Western Division.

STATEMENT OF FACTS

Leatha Benita Sims was a student at Schaefer Junior High School in Springfield, Ohio. At the time of the alleged incident Miss Sims was thirteen years old. William Waln and Max Launder are the principal and assistant principal, respectively, of Schaefer Junior High School and held those positions at the time of the alleged incident.

The facts are uncontroverted that Leatha Sims was a problem child for the administrators of Schaefer Junior High School for some time. She was continually tardy and involved in other student problems. As a result, disciplinary action had been taken against her on more than one occasion. In fact, on one occasion she had been paddled with the approval of her mother, Linda Gail Sims. On May 13, 1973, Leatha Sims was again tardy. As a result, Principal Waln told Leatha Sims that she would have to remain after school for detention. When it was time for detention Miss Sims came to the principal's office and advised that she could not remain for detention because she had to babysit for her sister. Mr. Waln told Leatha that she could go home to babysit upon verification. Leatha was unable to provide verification. As a result, Mr. Waln told Miss Sims that she would have to serve her detention.

Leatha Sims refused to serve the detention and said that she was going to leave anyway. At this time she was given the option by Mr. Waln to either serve detention or take two "cracks". Miss Sims after considering the matter refused to stay for detention. Therefore, Mr.

Waln attempted to administer "cracks". The facts are clear that he was unable to administer any of the "cracks". As a result, Miss Sims was never paddled. Mr. Waln did grab Miss Sims to stop her from leaving the room in an effort to administer the corporal punishment and in this confusion Miss Sims slipped and fell.

After Miss Sims slipped, she left the room and proceeded home. Miss Sims' testimony is that she did not act any differently when she left the principal's office than she would have on any other occasion. That there was nothing unusual about the manner in which she left the building. Upon returning home the evidence becomes conflicting. She testified at trial that she was going to meet her mother to go to the library, not to babysit. This is evidently the reason that she was unable to obtain verification of the babysitting story. It, therefore, appears from facts that Miss Sims is just an insubordinate student. The fact remains that on May 14, 1973, Miss Sims received absolutely no discipline from Mr. Waln or Mr. Launder regarding the insubordination.

Plaintiff's brief is full of District Court testimony and an interpretation of that testimony in a manner most favorable to the Plaintiff. This is to be expected in light of Plaintiff's position in this case. However, Defendants will not, in this statement of facts, go into a discussion of the District Court trial and the testimony that is a part of the record.

REASONS FOR DENYING THE WRIT

The Court of Appeals concluded that "the Plaintiff was not subjected to corporal punishment during the incident in question." There were no facts presented at the trial to indicate that this case presents a vehicle to challenge Section 3319.41 of the Ohio Revised Code.

Every case must be tried on its facts. If the Supreme Court begins allowing attorneys to file cases in the courts of this land without requiring them to put witnesses on the witness stand who can testify to facts that set up the allegations contained in their complaint, then the courts are open to every type of speculation. No law can be challenged in the courts without sufficient facts to present an issue. In this case there was simply no corporal punishment.

1. Cruel and Unusual Punishment

Petitioner in her brief argues that corporal punishment violates the Eighth Amendment prohibition against cruel and unusual punishments *per se* and as applied. It should be pointed out that several courts, including the District Court and the sixth Circuit Court of Appeals below have held that the Eighth Amendment prohibition of cruel and unusual punishments applies only to situations of criminal punishment judicially imposed and that, therefore, the Eighth Amendment does not prescribe the infliction of corporal punishment on a student by school personnel. See *Gonyaw v. Gray,* 361 F. Supp. 366 (D. Vt. 1973); see, also, *Powell v. Texas,* 392 U. S. 514, 531-532, 88 S. Ct. 2145, 20 L. Ed. 1254 (1968); *Negrich v. Hohn,* 246 F. Supp. 173, 176

(W. D. Pa. 1965) *aff'd.* 379 F. 2d 213 (3rd Cir.); *Zwick v. Freeman,* 373 F. 2d 110, 119 (2d Cir. 1967).

However, several courts have also discussed the issue of whether corporal punishment constitutes a *per se* violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. All of the decisions discovered, dealing with the issue as it relates to school authority, have held that no *per se* violation of Eighth Amendment standards exist. *Ware v. Estes,* 328 F. 2d Supp. 657-659 (N. D. Tex. 1971) *aff'd.* per curiam, 458 F. 2d 1360 (5th Cir. *cert. denied* 409 U. S. 1027 (1972); *Glaser v. Marietta,* 351 F. Supp. 555 (W. D. Pa. 1972); *Sims v. Bd. of Ed.,* 329 F. Supp. 678 (D. N. M. 1971); *Ingraham v. Wright,* 498 F. 2d 248 (5th Cir. 1974); *Nelson v. Heyne,* 491 F. 2d 352 (7th Cir. 1974).

Petitioner relies only upon "analogous circumstances" in her attempt to reach the conclusion that corporal punishment is unconstitutional *per se.* The case of *Jackson v. Bishop,* 404 F. 2d 571 (8 Cir. 1968) held that the whipping of Arkansas penitentiary inmates constituted prescribed cruel and unusual punishment. *Bramlet v. Wilson,* 495 F. 2d 714 (8 Cir. 1974), only states that there is a basis for a suit under the Civil Rights Act and that in that particular case the complaint was sufficient to state a claim. Without a discussion of the facts in *Bramlet* it is easy to distinguish the case at bar from that particular situation. In the case at bar there was no corporal punishment. The conclusion of the Petitioner, based solely on the authorities cited, is simply too tenuous to question the authorities previously discussed, each of which consider the precise issue of the constitutional validity of the use of corporal punishment on students by school personnel, and held that no violation exists.

Petitioner also relies on the case of *Furman v. Georgia,* 408 U. S. 238 (1972). *Furman* is the Supreme Court decision which considered the issue of whether capital punishment constituted a violation of the Eighth Amendment prohibition against cruel and unusual punishments. Since that case resulted in a five to four decision, with nine separate opinions, one by each justice, totaling some 138 pages, this writer will not attempt to synopsize the Court's opinions as they consider the Cruel and Unusual Punishment Clause. However, Petitioner has done so in the following statement found on page 9 of her brief:

> ". . . But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought to be justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be potently excessive and cruel and unusual punishment violative of the Eighth Amendment." 408 U. S. at 312.

Assuming that the quoted language is intended to relate the *Furman* opinions to the instant matter, it is asserted that at least some of the justices would be extremely surprised to find that their opinions in *Furman* dealing with the issue of capital punishment in a criminal setting, are being cited for the proposition that corporal punishment of school children is a *per se* violation of the Eighth Amendment. It should also be noted that in *Ingraham v. Wright,* supra, the Fifth Circuit relies on two of the opinions in *Furman* in holding that corporal punishment in schools is not a *per se* violation of the Eighth Amendment.

Nor is Petitioner's reliance on *Nelson v. Heyne,* supra, persuasive to establish that corporal punishment in schools constitutes a *per se* violation of the Eighth Amendment. The Seventh Circuit did find that beatings of 12-18 year old correctional institution inmates, and injection of tranquilizing drugs without adequate medical guidance and prescription did constitute cruel and unusual punishment. However, the Court also specifically distinguishes the factual situation of corporal punishment of school students and specifically indicates its agreement with an Indiana Supreme Court decision holding that a public school teacher may administer corporal punishment. The Court states: "The law appears to be well settled in both state and federal jurisdictions that school officials do not violate Eighth Amendment prescriptions against cruel and unusual punishment where the punishment is reasonable and moderate."

It is thus apparent that the claim that Section 3319.41 of the Ohio Revised Code violates *per se* the Eighth Amendment prohibition against cruel and unusual punishments must fail. No authorities holding *contra* have been discovered.

2. Deprivation of Liberty Without Due Process of Law

First of all let it be said that the Petitioner's amended complaint in the lower court at no time alleged any lack of due process of law on behalf of the Defendants in this case. I suppose the issue is raised in a continuing stab in the dark in hopes of giving the court some legal issue to hang its hat on. The facts presented at trial in this case represent one of the most meager efforts that this attorney has seen in more than seven years of trial practice.

Petitioner relies on the decision of *Goss v. Lopez,* 419 U. S. 565 (1975) to argue that "corporal punishment, if permissible, must be proceeded by at least that level of due process of law which the court imposed on ten (10) days suspensions of school children." The cases cited by the Defendant have no application in fact to the facts presented in the case at bar. Petitioner cites no cases holding that the imposition of corporal punishment by school personnel on pupils requires notice, hearing or representation. On the contrary, the courts in *Gonyaw v. Gray,* supra; *Glasser v. Marietta,* supra; and *Sims v. Bd. of Ed.,* supra, all held that the formalities generally associated with procedural due process would be inappropriately applied to the imposition of corporal punishment in schools. The court in *Gonyaw v. Gray,* supra at page 371, referring to corporal punishment in schools, stated simply: "in any event, it is a sanction which simply is not serious enough to require the prerequisite of a formal hearing."

The issue is before the Court as to "severe: corporal punishment" in *Ingraham v. Wright,* supra. It should be noted that *Ingraham* involved a situation where there was, in fact, corporal punishment.

A distinction must be made from other cases where corporal punishment is involved and this case where there is a real question as to whether or not the Court even has jurisdiction over action taken by an educator which is not in the corporal punishment area. It must be remembered that there was no corporal punishment administered in the case at bar.

3. Parental Rights

Petitioner apparently claims that the right of parents to raise their offspring according to their own precepts is a fundamental right, which leads to the conclusion that the imposition of corporal punishment without parental consent is a violation of such right.

Petitioner refers to the case of *Glaser v. Marietta,* supra. The essence of that holding was that the local school district could enforce its rules on corporal punishment, except as to a child whose parents had notified school officials that such disciplinary method is prohibited. However, the precedential value of the *Glaser* decision is weakened significantly by the court's reliance on the specific facts there in existence. As is stated in the footnotes to the later decision in *Gonyaw v. Gray,* supra, at page 367:

> "While the basis of this latter conclusion is not entirely clear, it should be noted that the underlying Pennsylvania statute authorizes school officials merely to 'exercise the same authority . . . over the pupils . . . as the parents . . . may exercise over them.'"

It should be apparent that the Ohio statute at issue specifically conveys to certain persons under certain circumstances the authority to inflict reasonable corporal punishment. Such a statutory difference would appear to be a critical factor distinguishing cases involving Section 3319.41 of the Ohio Revised Code from the *Glaser v. Marietta* holding. In light of the fact that this child had previously been paddled after notification and approval by her mother, the *Glaser* opinion loses considerable value as a precedent.

The court seems to be balancing the interest claimed by the parents in being able to raise their children in the manner desired, against the claims of the state for the need to assure order and discipline in the schools. The *Glaser* decision merely gave a judicial stamp of approval to the system already in use.

In *Gonyaw v. Gray,* supra, the court applies a very similar test, but with opposite results. The court cites *Meyer v. Nebraska,* 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), for the proposition that the state cannot unreasonably interfere with the right of parents to direct the upbringing of their children. The court also recognizes that the parental right is not without some limitation, citing *Prince v. Massachusetts,* 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1943). The court concludes that the issue becomes whether the authorization of corporal punishment is reasonably related to the legitimate purpose of school discipline, citing *Pierce v. Society of Sisters,* 268 U. S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070 (1924). The court concludes that the test is met and that no parental rights of plaintiffs therein have been violated.

The same type of balancing test is carried out in *Ware v. Estes,* supra, and the court has no trouble upholding the right of school officials to utilize corporal punishment in the face of parental objections.

The conclusion seems clear that the courts will attempt to weigh the interests asserted by the state against those propounded by parents of individual children. The results of such a balancing of interests test has favored the parental rights only in *Glaser,* supra, where there was

really no balancing required. In the other cases cited, the state interest is recognized and no constitutional violation is held to be shown.

CONCLUSION

The case at bar does not present facts sufficient to resolve a significant constitutional issue such as the question of cruel and unusual punishment through corporal punishment in the public schools of our land. Based upon the facts presented at trial wherein the Petitioner could show no corporal punishment it does not appear possible that a Writ of Certiorari could be granted.

Respectfully submitted,

ALFRED J. WEISBROD
ALFRED J. WEISBROD Co., L.P.A.
107 W. Main Street
Troy, Ohio 45373
Attorney for Respondents